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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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12 ALBERTO CARO TORRES,)
13 Petitioner,)
14 vs.)
15 D.W. NEVENS, *et al.*,)
16 Respondents.)
17 _____/

2:11-cv-00854-KJD-RJJ

ORDER

18 This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which petitioner, a
19 state prisoner, is proceeding *pro se*. Before the court is respondents' motion to dismiss. (ECF No. 10.)
20 Petitioner has opposed the motion (ECF No. 17), and respondents have replied (ECF No. 18.)

21 **I. Procedural History and Background**

22 On July 31, 2007, petitioner, Alberto Caro Torres, was convicted in the Second Judicial District
23 Court for the State of Nevada ("District Court") in case number CR07-1407, by way of guilty plea, of
24 one count of burglary. (Exhibits to Mot. to Dismiss Ex. 1, ECF No. 11.) Department 8 of the District
25 Court sentenced petitioner to a term of 28 months to 72 months in the Nevada State Prison, with credit
26 for 101 days of time served. (*Id.*)

1 On December 7, 2007, petitioner was convicted in District Court in case number CR07-0478,
 2 by way of guilty plea, of one count of assault with a deadly weapon. (*Id.* Ex. 2.) Department 3 of the
 3 District Court sentenced petitioner to a term of 12 to 30 months in the Nevada State Prison, with credit
 4 for 39 days of time served. (*Id.*) The District Court ordered the sentence in case number CR07-0478
 5 to be served consecutively with the sentence imposed in case number CR07-1407. (*Id.*)

6 Petitioner dispatched his petition for writ of habeas corpus to this court on April 7, 2011. (ECF
 7 No. 5.) In his petition, petitioner challenges his conviction in case number CR07-1407. Respondents
 8 move to dismiss the petition, arguing that petitioner is no longer in custody for the burglary conviction
 9 from case number CR07-1407, and thus, this court lacks jurisdiction to consider the petition.

10 **II. Custody Requirement**

11 Federal habeas corpus law permits prisoners to challenge the validity of convictions for which
 12 they are “in custody.” *See* 28 U.S.C. § 2254(a). Because custody is a statutory jurisdictional
 13 prerequisite, a federal district court may only consider a habeas petition if the petitioner was in custody
 14 at the time of filing the petition. *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (per curiam). Custody
 15 is determined at the time the petition is filed. *See Sanders v. Freeman*, 221 F.3d 846, 851 (6th Cir.
 16 2000). The custody requirement is satisfied if the petitioner is in “custody” when the petition is filed.
 17 *Carafas v. LaVallee*, 391 U.S. 234, 238-39 (1968). As a general rule, a petitioner is no longer in custody
 18 for purposes of asserting federal habeas jurisdiction where the sentence imposed has fully expired prior
 19 to the filing of the federal petition. *See, e.g., Maleng v. Cook*, 490 U.S. 488, 492 (1989); *Henry v.*
 20 *Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999). However, in *Garlotte v. Fordice*, 515 U.S. 39 (1995),
 21 the United States Supreme Court held that a habeas petitioner serving consecutive sentences is in
 22 custody under an earlier expired consecutive sentence until all of the consecutive sentences have expired,
 23 such that he can challenge an earlier expired consecutive sentence while serving later consecutive
 24 sentences. A court should not disaggregate a petitioner’s sentences, but rather should “comprehend them
 25 as composing a continuous stream.” *Id.* at 40.

26 Respondents contend that *Garlotte* is not applicable to this case because *Garlotte* is factually

1 distinguishable and inconsistent with the principles of finality and comity underlying the Antiterrorism
2 and Effective Death Penalty Act of 1996. According to respondents, unlike the petitioner in *Garlotte*,
3 petitioner's sentences, here, were not aggregated for the purpose of determining parole eligibility and
4 petitioner was sentenced by two different judges at two different times.

5 The court finds respondents' argument unpersuasive. Although it is an open question in the
6 Ninth Circuit, both the Third Circuit Court of Appeals and the Tenth Circuit Court of Appeals have held
7 that *Garlotte* applies to petitioners serving consecutive sentences imposed by different courts of the same
8 sovereign at different times. *DeFoy v. McCullough*, 393 F.3d 439, 442 (3d Cir. 2005); *Brown v.*
9 *Warden*, 315 F.3d 1268, 1270 (10th Cir. 2003); *Foster v. Booher*, 296 F.3d 947, 950 (10th Cir. 2002).
10 In *Foster*, the Tenth Circuit concluded that declining to apply *Garlotte* to such circumstances "runs
11 against the law of the Supreme Court." *Foster*, 296 F.3d at 950 (discussing *Maleng v. Cook*, 490 U.S.
12 488 (1989); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1974); and *Peyton v. Rowe*, 391 U.S.
13 54 (1968)). In *Defoy*, the Third Circuit reasoned that a prisoner is required to serve the remainder of
14 his first consecutive sentence before serving the second, and thus, "[t]he effect of any error as to the
15 former was to delay the start of the latter." *Defoy*, 393 F.3d at 442. According to the *Defoy* court,
16 because any remedy granted to a petitioner on the first sentence might affect his release date for the
17 second sentence, his petition challenging the first sentence is not moot under *Garlotte*. *Id.*

18 Furthermore, the *Foster* court found that any attempt to distinguish *Garlotte* on its facts ignores
19 the language in *Garlotte* that "sets out a clear and broad rule that [a court] must 'view consecutive
20 sentences in the aggregate, not as discrete segments.'" *Foster*, 296 F.3d at 950. In sum, in *Foster*, the
21 Tenth Circuit determined that "[t]here is no indication in the language of *Garlotte* that these principles
22 are or should be limited to the particular facts that the Court was faced with in that case." Here, this
23 court adopts the reasoning and the conclusion reached by the Third Circuit and the Tenth Circuit and
24 applies *Garlotte* to this case, even though petitioner's sentences were imposed by two different judges
25 at two different times. Accordingly, because petitioner is currently in state custody pursuant to a
26 sentence imposed consecutively to the state conviction he challenges in his petition, he is "in custody."

1 Thus, the court has jurisdiction to consider the petition and denies respondents' motion to dismiss.

2 **III. Other Pending Motions**

3 Petitioner moves for an order denying respondents' motion to dismiss. (ECF No. 17.) The court
4 grants this motion, in part, because the instant order denies respondents' motion to dismiss. However,
5 to the extent petitioner seeks a judgment on the pleadings under Fed. R. Civ. P. 12(c), the court denies
6 the motion. As correctly stated by respondents, under Rule 5 of the Rules Governing Section 2254
7 cases, they are entitled to answer the merits of the petition. Because an answer is a pleading, and Fed.
8 R. Civ. P. 12(c) only applies “[a]fter the pleadings are closed,” Fed. R. Civ. P. 12(c) is inapplicable.

9 Petitioner also moves for the appointment of counsel. (ECF No. 9.) There is no constitutional
10 right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551,
11 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993). The decision to appoint counsel is
12 generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S.
13 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984).
14 However, counsel must be appointed if the complexities of the case are such that denial of counsel
15 would amount to a denial of due process, and where the petitioner is a person of such limited education
16 as to be incapable of fairly presenting his claims. See *Chaney*, 801 F.2d at 1196; see also *Hawkins v.*
17 *Bennett*, 423 F.2d 948 (8th Cir. 1970). The claims in this case are not especially complex, and petitioner
18 has shown that he is capable of presenting his claims and arguments in a relatively clear and organized
19 fashion. Therefore, it does not appear that counsel is justified in this instance.

20 **IV. Conclusion**

21 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 10) is
22 **DENIED**.

23 **IT IS FURTHER ORDERED** that petitioner's motion for order denying respondents' motion
24 to dismiss (ECF No. 17) is **GRANTED in part and DENIED in part**.

25 **IT IS FURTHER ORDERED** that petitioner's motion for the appointment of counsel (ECF No.
26 9) is **DENIED**.

1 **IT IS FURTHER ORDERED** that respondents shall have **forty five (45) days** from the date
2 of entry of this order within which to answer the petition.

3 **IT IS FURTHER ORDERED** that petitioner shall have **forty five (45) days** after service of
4 the answer to file and serve a reply

5 DATED: September 25, 2012.

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UNITED STATES DISTRICT JUDGE
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